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DIVISION II

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STATE OF WASHINGTON

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No. 33242-6-II

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON GREGORY EISFELDT

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Richard D. Hicks

BRIEF OF RESPONDENT

David H. Bruneau
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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I. STATEMENT OF THE CASE AND PROCEEDINGS.

The background of this case is set forth in the comprehensive “Stipulations, Findings of Fact, Conclusions of Law, and Verdict” of the Court which were entered on January 10, 2005 (CP 147-154).

Summarized, the facts are:

1. Beginning in January, 2003, James S. Wege leased the residence located at 5015 21st Avenue, S. E., Lacey. CP 147.
2. On August 5, 2003, Mr. Mike Piper of C.P.I. Construction arrived at the premises at the request of Mr. Wege to perform some repair work. Piper was provided a key to the residence by “Jason”. CP 147.
3. Piper discovered extensive damage to the living room floor area apparently due to a large diesel oil spill. In order to air out the premises, he went to the garage, found that it had been sealed shut, and looked in a bag that contained green leafy material that he suspected to be marijuana. Piper called the Thurston County Narcotics Task Force (hereinafter, TNT). CP 147.
4. Det./Sgt. Doug Price, Det. Ben Elkins, and Det. Glen Stahl, TNT, arrived and were shown (by Piper) what he already had seen. A search warrant was obtained and the residence thoroughly searched. CP 148.

5. The detectives noted that the garage door had been sealed shut with a foam sealant. Heavy gauge wiring and silver mylar material was found in the aforementioned bag along with the suspected marijuana, later confirmed by forensic examination to contain marijuana and weigh 548. grams. The sealant, mylar, and wiring are implements the drug detectives associated with indoor marijuana growing operations. CP 148.
6. The remainder of the residence was essentially empty, except for remnants of what appeared to the detectives to have been an indoor marijuana growing operation: "channel metal" used to hang grow equipment from ceilings, power cords, insulafoam (heat insulation), duct material (heat venting), staples in walls, and tape, indicative that heat-reflecting mylar had been in place, and diesel oil, used to provide a power source. CP 148.
7. Neighbors Jerry and Herberta Gray (5013 21st Avenue) described the former occupants of 5015 21st Avenue as the "renter-Jason", and a "housemate-Ben". The Grays saw a Ryder truck at the residence on or about June 30 or July 1st, 2003, they thought. They did not see "Jason" or "Ben" after that. CP 148.

8. On June 17th, 2003, Ben Charles rented a Ryder moving truck from Auto Mall mini-storage, and returned the truck on June 20th. Charles said to the renter, Roy Monroe, that he needed the truck (with a lift gate) to move a generator. CP 148.
9. Notes and records found in the residence were: rental receipts for 5015 21st Avenue, S. E. in the name of James Wege, a letter to Northwest Harley Davidson signed by Ben Charles, a letter addressed to Jason Eisfeldt, receipts for items sold to Jason Eisfeldt, utility bills to James Wege, a receipt for a "How to Grow Medical Marijuana" book, and paperwork for light bulbs and equipment used to grow marijuana. CP 148 and 149.
10. In April, 2003, James S. Wege purchased the property and residence at 1601 Eastside Street, Olympia. Power service for this house was initiated in May, 2003. CP 149.
11. On August 27, 2003, TNT detectives executed a search warrant at the 1601 Eastside residence and discovered an indoor marijuana growing operation consisting of over one hundred plants in the garage. Later, these plants weighed out at over 12 pounds of "green vegetable matter", and 105 plants (30 "starter" plants, 75 mature plants) weighed-in at over 28 pounds, all of which were found to contain marijuana. This grow was served electrically by a

generator, and powered grow lights, halide light shields, air filtrations, climate controls, and humidity control. CP 149.

12. Also located in the residence at 1601 Eastside were business records indicating Nextel telephone subscriber details obtained by Wege on or about December 31, 2002. Three telephone numbers are shown under James Wege with alias columns as follows:
"Jason" 239-5274, "Ben" 239-5275, and "James" 239-5276.
Detectives had noted that the "Jason" number (239-5274) had been seen on purchase orders for "grow equipment" found on August 5 at 5015 21st Avenue, S. E., Lacey. Phone records reflect telephone calls between these numbers beginning in February, 2003. CP 149.
13. Also located at 1601 Eastside was equipment (generator, ventilation parts, PVC piping) reflected on records found at the 21st Avenue, S. E. address. Likewise, the "grow" at 1601 Eastside was set up according to a diagram located at the 21st Avenue, S. E. address. CP 149.
14. Marijuana growing equipment located at 1601 Eastside was processed for latent fingerprints and subsequent examination revealed that the fingerprints of Jason Eisfeldt were found on 5 separate halide light shields as well as on an electrical box.

Fingerprints of Benjamin Charles were identified from halide light shields (6 separate lifts). CP 150.

15. Det./Sgt. Price and Det. Ben Elkins together have investigated over two hundred indoor marijuana growing operations. Based upon their observations made at the scenes at 5015 21st Avenue, S. E., Lacey and 1601 Eastside, Olympia, as well as assimilation of the documents and evidence found at both scenes, the officers concluded that the marijuana growing operation had been relocated from the former address to the latter address on or after June 17, 2003. CP 150.
16. James Wege was contacted, arrested, and interviewed on August 27, 2003. He admitted that he rented the residence at 21st Avenue for his "friends" who he did not name. He denied knowledge of a marijuana grow there. He said his "friends" paid him the rent by cashier's check. CP 150.
17. Wege claimed that he set up the grow in the garage at 1601 Eastside, Olympia, with his "friends", who he would not name. Wege said that he had harvested some of the marijuana, which he planned to sell, he thought-for \$2,500 per pound, and hoped to make \$100,000. He allowed that the "grow" had been underway for approximately two months. CP 150.

18. Jason Eisfeldt was arrested on August 27, 2003 and interviewed. He admitted that he engaged in growing marijuana so that he would not have to work for a couple of years. Eisfeldt said that the grow at 1601 Eastside had been going on for two months, and that he and “the other folks” had purchased the equipment used to maintain the grow. CP 150 and 151.
19. Eisfeldt said he had been given a key to the residence (1601 Eastside) by “James”¹ and that “they” had designed it by reading books. He said that “James” had cut some of the plants, and that “another guy” who he would not name-helped in the grow. Later, Eisfeldt named him as “Ben”. CP 151.
20. According to Eisfeldt, the grow at 21st Avenue Southeast was underway and powered by a generator. After diesel fuel was spilled, the grow was shown to Wege (from who he rented), and Wege helped by agreeing to move the growing operation and taking care of the damages with the home owner. Ben Charles rented the moving truck and the grow was moved to 1601 Eastside. CP 151.

¹ At trial, references to named persons would be substituted with “another person” pursuant to *Bruton v. United States* 391 U.S. 123, 88 S. Ct. 160, 20 L. Ed 2d 476 (1968).

II. RESPONSE TO ASSIGNMENTS OF ERROR.

THE DISCOVERY OF A MARIJUANA
GROW AND ENSUING SEARCHES AND
SEIZURES WERE IN ALL RESPECTS
CONSTITUTIONALLY VALID.

A. THE POLICE ENTRY AT THE LACEY HOUSE.

The Fourth Amendment prohibition against unreasonable searches and seizures protects persons only against governmental actions and not the actions of private citizens acting on their own initiative. State v. Bishop, 43 Wn. App. 17, 20, 714 P.2d 1199 (1986). Article 1, Section 7 of the Washington State Constitution affords no more protection from private searches than the Fourth Amendment. State v. Ludvik, 40 Wn. App. 257, 262, 698 P.2d 1064 (1985), State v. Dold, 44 Wn. App. 519, 722 P.2d 1353 (1986). Thus, the status of Mr. Piper – whether it be as invitee, licensee, or trespasser – is irrelevant. Constitutional privacy concerns do not apply to the likes of a private party.²

Certainly, the arrival by the police at Piper's behest may be considered a "search." But this subsequent warrantless "search" by the

²Unless the individual was acting as an agent of or in concert with government employees. The burden is on the defendant to present evidence that indicates collusion between the citizen informant and the police. State v. Dold, 44 Wn.App. 519, 523, 722 P.2d 1353 (1986).

authorities does not violate constitutional proscriptions, as long as it does not exceed the bounds of the prior “private” search. State v. Dold, supra, p. 522, U.S. v. Jacobsen, 466 U.S. 109, 80 L. Ed.2 85, 10 U. S. Ct. 1652, 1657 (1984). Detective Elkins was shown (by Piper) what Piper had seen previously (Exhibit A p. 4, 5). This search was no more intrusive than the “search” by Piper. Thus, the information gathered by the detectives and presented to the magistrate did not violate any constitutional proscriptions.

B. THE INFORMATION PRESENTED TO THE
MAGISTRATE ESTABLISHED PROBABLE
CAUSE FOR THE ISSUANCE OF THE WARRANT.

Detective Elkins responded to the Lacey residence and saw “... half a gallon bucket full” of marijuana, as well as the sealed-off garage. The mylar and heavy gauge wire, coupled with the personal observations of the detective, were conveyed to the magistrate. Moreover, the particular expertise of the officer was demonstrated in the sworn testimony. Detective Elkins was no novice, and such experience is an ingredient for establishing probable cause. In determining whether probable cause for seizure exists, the function and qualifications of the police officer may be considered, for “... what may appear as innocent behavior to the untrained layman can present a pattern of criminal conduct

to the investigating officer, skilled by the experience of his training and position.” State v. Cabigas, 5 Wn. App. 183, 185, 486 P.2d 1139 (1971).

Probable cause to issue a search warrant exists if the sworn testimony in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of crime can be found at the place to be searched. State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999). In reviewing a search warrant, the court is required to test in “a common sense, practical manner” rather than in a “hypertechnical” fashion. State v. Maddox, 116 Wn. App. 796, 67 P.3d 1135 (2003). Reviewed in such a fashion, the warrant and application passes constitutional muster.

The information presented to the magistrate was not “stale.” The marijuana may not have been ripening on the vine, but it appeared to be marijuana. Moreover, evidence of manufacturing does not require plant and dirt be found “in flagrante delicto.”³

To avoid “staleness” of information, the facts and circumstances recited in a sworn statement must establish reasonable probability that

³“Manufacture” means the production, preparation, propagation, compounding, conversion, or processing...”production” includes the... planting, cultivating, growing, or harvesting of a controlled substance. RCW 69.50.101(p) and (y).

criminal activity is occurring at or about the time the warrant is issued.

State v. Perez, 92 Wn. App. 1, 963 P.2d 881 (1998). Criminal activity was occurring while Detective Elkins was speaking to the magistrate. To claim otherwise is sheer sophistry.

C. THERE WAS AMPLE PROBABLE CAUSE
FOR THE ISSUANCE OF THE WARRANT
FOR THE RESIDENCE AT 1601 EASTSIDE.

The affidavit and application for search warrant presented by Detective Elkins on August 27th is comprehensive, and begins with an introductory paragraph under "Probable Cause," that plainly states that Elkins believes that a marijuana grow is present at Wege's residence at 1601 Eastside Street. Salient features of the warrant establish, directly and/or by inference, the following:

1. Marijuana and evidence of a marijuana grow was found at 5015 21st Avenue, Lacey, a house leased by Wege since January, 2003. "Jason" and "Ben" lived there.
2. "Jason" Eisfeldt and "Ben" Charles were associated with the house at 5015 21st Avenue. They were seen to be moving out of this Lacey house in late June – early July, 2003.
3. When officers went to the Lacey house on August 5, 2003, it was unfurnished and apparently uninhabited. Some marijuana and the

remains of an apparently recently removed marijuana growing operation was evident.

4. Notes and records discovered at the Lacey residence established a close link between Wege, Eisfeldt and Charles. These included power bills for the Olympia house mailed to Wege at Lacey, receipts for purchases of thousands of dollars worth of equipment, mail and correspondence to and from Charles and Eisfeldt, and paperwork and paraphernalia for production of marijuana.
5. The Olympia residence was purchased by Wege in April, 2003. A power surge – three times that normally required – was noted at that residence beginning in May, 2003. Indoor marijuana grows require substantial electrical power.
6. The upsurge of power usage at the Wege Olympia residence was consistent with the power usage at Wege's leased premises in Lacey in May and June, 2003.

Based upon these features, as well as the plethora of detail in the affidavit, it was reasonable for the magistrate to conclude that evidence of marijuana production would be found at 1601 Eastside.

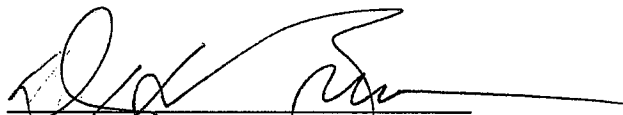
Recently the Court of Appeals reminded us of the manner in which search warrants are to be reviewed. In State v. Wible, 113 Wn. App. 18, 21, 51 P.3d 830 (2002) the court said:

We review the validity of a search warrant for abuse of discretion giving great deference to the issuing magistrate's determination of probable cause; generally, the warrant is valid if a reasonable, prudent person would understand from the facts contained in the officer's affidavit that a crime has been committed and that evidence of the crime is located at the place to be searched; as long as the basic requirements are met, affidavits should be viewed in a commonsense, not hypertechnical manner; doubts should be resolved in favor of the warrant.

III. CONCLUSION.

The conduct of the police was constitutionally appropriate and the trial court so found. The decision of the trial court should be affirmed by this court.

Respectfully submitted this 21 of April, 2006.

A handwritten signature in black ink, appearing to read 'David H. Bruneau', is written over a horizontal line.


David H. Bruneau (WSBA 6830)
Attorney for Respondent

STATE OF WASHINGTON,
Respondent,
vs.
JASON GREGORY EISFELDT,
Appellant.


STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

Clifford F. Cordes
Attorney at Law
2625 Parkmont Lane SW, Suite B
Olympia, WA 98502-1038

Signed this 20th day of April, 2006, at Olympia, Washington.


Lisa Wilson
Paralegal

BY Comm DEPUTY


Lisa Wilson
Paralegal